

STATE OF MICHIGAN
COURT OF APPEALS

DONALD MERRY and BARBARA MERRY,

Plaintiffs-Appellants,

v

TYRONE TOWNSHIP, RICHARD
SCHUMACHER, and LIVINGSTON COUNTY
ROAD COMMISSION,

Defendants-Appellees.

UNPUBLISHED

April 11, 2006

No. 265122

Livingston Circuit Court

LC No. 04-021081-CZ

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motions for summary disposition under MCR 2.116(C)(7) based on res judicata, collateral estoppel, and governmental immunity. We affirm.

This action arises from plaintiffs application to defendant Tyrone Township (the "Township") for approval to split their ten-acre parcel of land into two parcels. Plaintiffs intended to have an existing driveway on the property serve both parcels. The Township conditioned its approval of plaintiffs' land split on plaintiffs obtaining a shared driveway permit from defendant Livingston County Road Commission (the "Road Commission"). The Road Commission denied the permit because the shared driveway would not conform to its sight-distance standards. In a prior action, plaintiffs brought suit against the Road Commission, appealing its administrative denial of a permit and raising additional claims for injunctive relief and an equal protection violation. The prior action was dismissed when the trial court granted the Road Commission's motion for summary disposition.

After plaintiffs filed a claim of appeal from the dismissal order in the prior action,¹ they filed this action against the Road Commission, the Township, and Richard Schumacher, a planning commission member and Township supervisor. Plaintiffs alleged that the Township's

¹ The appeal in the prior action (Docket No. 258315) has been submitted for decision along with this appeal.

land use ordinance violated the Land Division Act, MCL 560.101 *et seq.* (Count I); that the Township violated their constitutional rights to due process and equal protection (Count II); that the Township and Schumacher were both negligent (Counts III and IV); and that the Road Commission's sight-distance regulations were invalid because they were arbitrary and unreasonable (Count V). All defendants moved for summary disposition, arguing that plaintiffs' claims were barred by either res judicata, collateral estoppel, or governmental immunity. The trial court agreed and granted summary disposition for all defendants.

I. Standard of Review

The question whether res judicata or collateral estoppel bars a subsequent action or claim is reviewed de novo. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004) (res judicata); *McMichael v McMichael*, 217 Mich App 723, 726; 552 NW2d 688 (1996) (collateral estoppel). A trial court's grant or denial of a motion for summary disposition is also reviewed de novo. *Pierce v Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005). When reviewing a motion under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties and accept the contents of the complaint as true unless affidavits or other appropriate documents specifically contradict them. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

II. Res Judicata and Collateral Estoppel

The doctrine of res judicata bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Adair, supra* at 121. The doctrine of res judicata is applied broadly, barring not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Id.*

Collateral estoppel precludes relitigation of issues between the same parties. *VanVorous v Burmeister*, 262 Mich App 467, 479; 687 NW2d 132 (2004). "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (citations and internal quotations omitted).

A. Road Commission

With respect to the Road Commission, only the third requirement of res judicata is in dispute. In Count V of plaintiffs' complaint, labeled "Set Aside Road Commission Regulations," they allege that the Road Commission's regulations are invalid under MCL 247.324. They also allege that the regulations are not reasonable or consistent with public safety, that they are enforced in an arbitrary, capricious, and unreasonable manner, and that they are not suitable for the conditions on McGuire Road. These claims closely relate to plaintiffs' previous action challenging the Road Commission's enforcement of its regulations on statutory and constitutional grounds. Because plaintiffs' Count V in the present action raises claims that could or should have been raised in the prior action, those claims are barred by res judicata.

We reject plaintiffs' argument that they could not have raised these claims in the prior action because they were not permitted to conduct discovery. The protective order that was entered in the prior action only affected plaintiffs' ability to prove their claims against the Road Commission; it did not excuse plaintiffs from raising whatever claims they had or exercising reasonable diligence in discovering their claims. Moreover, the allegations in Count V are not based on information that was exclusively within the Road Commission's control, or that plaintiffs could not have obtained elsewhere with reasonable diligence. Indeed, the Road Commission's regulations are a matter of public record, and plaintiffs submitted evidence in the prior action that defendant's regulations were outdated and inconsistent with the most current American Association of State Highway and Transportation Officials recommendations. Under these circumstances, there is no basis for concluding that plaintiffs' present claims could not have been raised in the prior action. Accordingly, all three requirements of res judicata are satisfied with respect to the Road Commission. Therefore, it is unnecessary to determine whether plaintiffs' present claims against the Road Commission are also precluded by collateral estoppel, or the compulsory joinder rule, MCR 2.203(A).

B. Tyrone Township

Plaintiffs argue that res judicata is not applicable to their claims against the Township, because the protective order that was entered in the prior action prevented them from raising their present claims in the earlier action. This argument fails for the same reasons that it failed with respect to the Road Commission. Plaintiffs' claims against the Township are not based on any information that was shielded by the protective order. On the contrary, they are based on the Township's own conduct in dealing with plaintiffs throughout the land use application and permit approval process.

Plaintiffs also argue that res judicata is inapplicable to the Township because the Township was not a party to the prior action and lacks privity with the Road Commission. The privity requirement is satisfied if the parties to the second action are substantially identical to the parties in the first action. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003). Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005). In *Adair, supra* at 122, our Supreme Court explained:

To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. . . . The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation.

The Township is in privity with the Road Commission only to the extent that plaintiffs raise claims against the Township that relate to the enforcement and validity of the Road Commission's sight-distance requirements. The Township conditioned its own approval of plaintiffs' land split on the Road Commission's approval of the shared driveway. The Land Division Act requires the Township to find that each parcel resulting from a parcel split is "accessible," which means that it must have a driveway or easement that conforms to the local authority's (here the Road Commission) location standards. MCL 560.102(j) and MCL

560.109(1)(e). Thus, the Township and the Road Commission shared a “working functional relationship” in which both governmental bodies share a “substantial identity of interest” in enforcing the same regulations.

However, to the extent that plaintiffs’ claims against the Township are predicated on matters not involving the Road Commission’s regulations and standards, there is no working functional relationship or identity of interest between the Township and the Road Commission.

In Count I, plaintiffs allege that the Township’s land division ordinance violates the Land Division Act, MCL 560.101 *et seq.* Count I does not involve any allegations concerning the validity or enforcement of the Road Commission’s regulations and, therefore, Count I is not barred by *res judicata*. In Count II, plaintiffs allege equal protection and due process violations. The equal protection claim is based on an allegation that the Township required them to comply with the Road Commission’s sight-distance regulations, but the due process claim is predicated on allegations that the Township’s ordinance does not comply with the Land Division Act. Consequently, the equal protection claim is barred by *res judicata*, but the due process claim is not. In Count IV, plaintiffs allege that the Township was negligent in requiring compliance with the Road Commission’s sight-distance requirements. Thus, *res judicata* precludes plaintiffs’ negligence claim.²

IV. Negligence Claims Against Richard Schumacher and Tyrone Township

Plaintiffs argue that the trial court erred in determining that their negligence claims were also barred by governmental immunity. We disagree.

The governmental immunity act, MCL 691.1401 *et seq.*, provides immunity to a government defendant when it is engaged in a governmental function. MCL 691.1407 provides, in pertinent part:

(1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. . . .

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by

² The Township additionally argues that plaintiffs’ equal protection and negligence claims are barred by collateral estoppel. Because we have concluded that these claims are barred by *res judicata*, we need not address the collateral estoppel argument.

the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

* * *

(5) A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

Governmental immunity is a characteristic of government that prevents the imposition of tort liability. *Mack v Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002). A party that sues a governmental unit must plead facts in avoidance of immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental function. *Id.* at 204. "Governmental function" is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter, ordinance, or other law. *Id.*; MCL 691.1401(f). To determine if a governmental agency was engaged in a governmental function, a court must focus on the general activity, and not the specific conduct engaged in at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

The Township was unquestionably engaged in a governmental function when it received and processed plaintiffs' application for land use approval. Indeed, plaintiffs' complaint fails to allege any facts in avoidance of governmental immunity. Plaintiffs argue on appeal that the Township acted outside the scope of its authority because its officials "did anything and everything they could to delay the progress of [plaintiffs'] land division application." Apart from being vague, this argument fails because this Court must focus on the government defendant's general activity (handling an application), not the specific conduct (delay), at the time of the alleged tort. *Tate, supra* at 661.

Schumacher, as a member of the planning commission, is entitled to immunity under § 7(2) for acts committed within the scope of his authority that are not grossly negligent. Whether an employee was acting within the scope of his authority depends on the reasonable power delegated to him to accomplish the business of his employer under the circumstances. *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 407-409; 605 NW2d 690 (1999). Schumacher's conduct in handling plaintiffs' application is clearly within the reasonable power delegated to him to accomplish the Township's business in reviewing land use applications, even if he made

mistakes that delayed the application's progress. Accordingly, it was within the scope of his authority. Although plaintiffs "believe that he was grossly negligent," they do not allege any facts showing that he engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). At worst, plaintiffs allege that Schumacher made legal errors by requiring them to clear unnecessary administrative hurdles, but this does not amount to reckless conduct or indifference to the possibility of injury. Plaintiffs' subjective belief that Schumacher purposefully stalled and thwarted approval for their application is too speculative to establish either that Schumacher acted outside the scope of his authority, or that he was grossly negligent. Because Schumacher is clearly entitled to immunity under § 7(2), we need not consider whether he is also entitled to unqualified immunity under subsection (5).

V. Plaintiffs' Remaining Statutory Claim

Plaintiffs argue that the trial court erred in finding that the Land Division Act does not provide a sanction when a municipality fails to approve or deny a land use application within forty-five days. The interpretation and application of a statute are questions of law that this Court reviews de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003).

MCL 560.109 provides that a "municipality shall approve or disapprove a proposed division within 45 days after the filing of a *complete application* for the proposed division with the assessor or other municipally designated official." The statute does not provide a sanction for a municipality's failure to act within forty-five days. This Court will read nothing into a statute that is not within the manifest intent of the Legislature as indicated by the act itself. *People v Lange*, 251 Mich App 247, 253-254; 650 NW2d 691 (2002). Because the statute does not impose a sanction, the trial court properly determined that none is available.

As a final matter, we note that the trial court never squarely addressed plaintiffs' only remaining claim that the Township's land division ordinance is unconstitutional insofar that it requires plaintiffs to obtain a shared driveway permit, which plaintiffs maintain exceeds the requirements imposed by the Land Division Act, MCL 560.101 *et seq.* Although we determined that this claim was not barred by res judicata, we conclude that it fails as a matter of law.

MCL 560.109(1)(e) requires that each parcel resulting from a land division be "accessible." The term "accessible" is defined by MCL 560.102(j) as follows:

"Accessible," in reference to a parcel, means that the parcel meets 1 or both of the following requirements:

(i) Has an area where a driveway provides vehicular access to an existing road or street *and meets all applicable location standards of the state transportation department or county road commission* under Act No. 200 of the Public Acts of 1969, being sections 247.321 to 247.329 of the Michigan Compiled Laws, and of the city or village, or has an area where a driveway can provide vehicular access to an existing road or street and meet all such applicable location standards.

(ii) Is served by an existing easement that provides vehicular access to an existing road or street and that *meets all applicable location standards of the state transportation department or county road commission* under Act No 200 of the Public Acts of 1969 and of the city or village, or can be served by a proposed easement that will provide vehicular access to an existing road or street and that will meet all such applicable location standards. [Emphasis added.]

The Township's ordinance requirement that a shared driveway permit be obtained from the Road Commission clearly embodies the essence of this statutory requirement. Thus, the ordinance neither conflicts with the statute, nor does it impose any requirements in excess of statutory requirements. Accordingly, plaintiffs' Count I and the due process portion of their claim in Count II, which are both predicated on plaintiffs' contention that the Township's ordinance violates the Land Division Act, fail as a matter of law. Although the trial court did not dismiss these claims for this reason, this Court will not reverse a trial court's order if it reached the right result, albeit for a wrong reason. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michael J. Talbot